

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of:

Policies and Rules for Licensing
Fallow 800 MHz Specialized
Mobile Radio Spectrum Through a
Competitive Bidding Process

To: The Commission

RM-7985

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COMMENTS OF
MCCAW CELLULAR COMMUNICATIONS, INC.

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TABLE OF CONTENTS

	<u>Page</u>
I. SUMMARY	1
II. FLEET CALL'S PETITION SHOULD BE DEFERRED PENDING ENACTMENT OF COMPETITIVE BIDDING LEGISLATION	2
III. IN THE INTERIM, THE COMMISSION SHOULD CAREFULLY CONSIDER IMPORTANT PUBLIC POLICY AND LEGAL ISSUES ASSOCIATED WITH THE REGULATORY AND MARKETPLACE RELATIONSHIPS BETWEEN CELLULAR AND ESMR CARRIERS . .	3
A. Fleet Call Seeks To Replicate Cellular Services In The SMR Band	3
B. The Innovator Block and SMR End User Licensing Proposals Raise Renewed Issues Under Section 332 of the Communications Act . .	5
C. The Petition Highlights the Need for an Inquiry into the Regulatory and Marketplace Relationships Between Mobile Common Carrier and Private Carriers	7
IV. CONCLUSION	10

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COMMENTS OF
MCCAW CELLULAR COMMUNICATIONS, INC.

McCaw Cellular Communications, Inc. ("McCaw"), by its attorneys, respectfully submits its comments concerning the above-captioned Petition for Rulemaking filed by Fleet Call, Inc. ("Fleet Call"). As discussed below, Fleet Call's proposal to license "innovator blocks" of 800 MHz SMRS frequencies through auctions should be deferred pending the passage of enabling legislation. In the interim, the continuing transformation of SMRs into functional equivalents of cellular carriers warrants a comprehensive examination of associated legal and public policy issues.

I. SUMMARY

Fleet Call asks the Commission to auction "innovator blocks" of SMR spectrum that licensees could assemble into a national wireless infrastructure with roaming capabilities. As Fleet Call candidly admits, the service provided over this infrastructure would be functionally indistinguishable from

cellular service. In this context, Fleet Call's petition warrants several basic comments.

First of all, the Commission should defer consideration of the proposal until necessary enabling legislation is enacted. This would be more logical and efficient than plunging forward without first ascertaining what form of competitive bidding will be authorized and whether SMR spectrum will be eligible for such new licensing processes.

In the interim, the petition highlights the need for the Commission to address important public policy and legal issues associated with ESMRs' becoming functionally identical to cellular carriers. First, the Commission should evaluate the effects of the "innovator block" and SMR end user licensing proposals upon ESMRs' legal status under Section 332 of the Communications Act. Second, the Commission should move forward rapidly to remove current regulatory barriers to full and effective cellular competition with ESMRs in the SMR and dispatch marketplace. Third, the Commission should initiate a proceeding to develop long-term policies defining the regulatory and marketplace relationships between common carriers and private carriers.

II. FLEET CALL'S PETITION SHOULD BE DEFERRED PENDING ENACTMENT OF COMPETITIVE BIDDING LEGISLATION.

Fleet Call's proposal is built around the premise that blocks of SMR spectrum could be combined and then licensed

through auction processes. The Commission, of course, does not yet have authority to utilize competitive bidding procedures. Nor can the Commission anticipate at this time the nature, form and extent that such authority might ultimately take.

In these circumstances, common sense dictates that the Commission defer action on the Fleet Call petition until competitive bidding legislation is enacted. This will avoid premature and potentially unproductive exploration of the merits of the innovator block auction plan. The Commission could promptly solicit comments when the full scope of auction authority is known and implementation policies have been established.

III. IN THE INTERIM, THE COMMISSION SHOULD CAREFULLY CONSIDER IMPORTANT PUBLIC POLICY AND LEGAL ISSUES ASSOCIATED WITH THE REGULATORY AND MARKETPLACE RELATIONSHIPS BETWEEN CELLULAR AND ESMR CARRIERS.

A. Fleet Call Seeks To Replicate Cellular Services In The SMR Band.

In its 1990 waiver request, Fleet Call sought the Commission's permission to create a new enhanced SMR service.¹ Fleet Call asserted that "ESMR differs both

¹ Fleet Call, Inc. Request for Authority to Assign SMR Licenses and Waiver of Certain Private Radio Service Rules (filed April 5, 1990) ("Waiver Request"). This waiver request was subsequently modified in several respects by Fleet Call's comments, which were filed on June 7, 1990 ("Comments").

functionally and technically from cellular technology in several critical ways,"² including the ESMRs' lack of roaming capability.³

In its current Petition, Fleet Call proposes to expand the ESMR concept, contending that ESMRs must have an opportunity to develop cellular-type ubiquitous coverage.⁴ Its petition envisions the innovator blocks as setting the foundation for a national wireless infrastructure to rival that established by McCaw and other cellular carriers -- enabling SMRs "to provide virtually 'universal' coverage to

² Reply Comments of Fleet Call, p. 11.

³ Id. at 11-12. Fleet Call also noted that "ESMR, like other SMR systems, will serve only licensed, eligible end users," and that "[t]o the extent that ESMR succeeds in attracting customers away from cellular systems, it will not be because they see ESMR as a functional equivalent to cellular They would not endure the burden of end user licensing, which is not part of cellular telephone service... Waiver Request at 36.

The Commission has proposed, of course, to eliminate separate licensing of SMR end users. See Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems, PR Docket No. 92-79, FCC 92-172 (released May 5, 1992). McCaw has filed comments in that proceeding.

⁴ Id. at 10. See also "Digital Technology To Help SMR Compete With Cellular," Industrial Communications, March 20, 1992, at 2, quoting Fleet Call Chairman Morgan O'Brien: "we have a very exciting opportunity to move to the forefront of technology even faster than cellular I hope that we [the ESMR roaming consortium] are going to be the first with a nationwide, ubiquitous, seamless network."

support portable mobile use by customers who find themselves operating over increasingly wide regional areas."⁵

McCaw always has viewed ESMR service as a direct competitor to cellular, notwithstanding Fleet Call's earlier disavowal that the services were substitutable. At any rate, it is now clear that Fleet Call does intend to compete head-on with cellular, and that the instant Petition is designed to achieve that end.

McCaw does not dispute Fleet Call's right to compete. Nonetheless, the innovator block scheme and the Commission's proposal to eliminate the SMR end user licensing requirements require the Commission to acknowledge that cellular and ESMR service are comparable and competitive, and should be regulated under comparable rules.

B. The Innovator Block and SMR End User Licensing Proposals Raise Renewed Issues Under Section 332 of the Communications Act.

Fleet Call's efforts to eliminate the functional differences between cellular carriers and ESMRs inherently raise renewed controversies under Section 332 of the Communications Act. In attempting to draw a definitive

⁵ Id. at 13. In short, Fleet Call seeks the ability "to combine a single unit with the same size and shape and functionality of today's best cellular units with what was before separate segments of the communications industry, such as paging, data, interconnection and dispatch." "Digital Technology To Help SMR Compete With Cellular," Industrial Communications, March 20, 1992, at 3.

boundary line between common carriers and private carriers, the Congress chose a functional test:

[T]he basic distinction set out in this legislation is a functional one, i.e., whether or not a particular entity is engaged functionally in the provision of telephone services or facilities or a common carrier as part of the entity's service offering. If so, the entity is deemed to be a common carrier.⁶

Significantly, when describing the functional classifications, Congress had a clear idea of which services would be considered private or common carriage. Indeed, the Committee used then-existing Local Government, Police, Fire, Highway Maintenance, Forestry Conservation, Special emergency, Power, Petroleum, Forest Products, Motion Picture, Relay Press, Special Industrial, Business, Manufacturers, Telephone Maintenance, Motor Carrier, Railroad, Taxicab, and Automobile Emergency dispatch systems as examples of PLMS systems.⁷ In contrast, the Senate sponsors of the bill stated explicitly that "[PLMS] does not include common carrier operations like the new cellular systems."⁸

⁶ H.R. Rep. No. 97-765, 97th Cong., 2d Sess. 55 (1982).

⁷ Id. at 54.

⁸ See Statement of Mr. Goldwater, for himself, Mr. Packwood, Mr. Schmitt, Mr. Pressler, Mr. Stevens, Mr. Cannon, Mr. Hollings, and Mr. Inouye upon introduction of S.929, April 8, 1981, 127 Cong. Rec. S3702-03 (daily ed. April 8, 1981).

Against this backdrop, it is clear that Fleet Call's innovator block proposal triggers renewed questions about its functional and legal status. The proposed wide-area ESMR service is functionally "like" cellular service. Indeed, Fleet Call's Chairman, Morgan O'Brien, is reported to have said that "the introduction of digital technology with its expanded interconnection into the SMR world and new customer demand is helping to remove the differences between SMR and cellular."⁹ He also has stated that:

Part of the message that we have been taking around the world ... is that there really aren't any differences in terms of the way these [SMR and cellular] units function Regulatory distinctions that were drawn up in the 1970s [in which] you could see a nice, bright line between a dispatch phone and a mobile telephone no longer make as much sense.¹⁰

Consequently, there would appear to be no rational basis for continuing to claim that ESMR service falls within the scope of Section 332.

C. The Petition Highlights the Need for an Inquiry into the Regulatory and Marketplace Relationships Between Mobile Common Carrier and Private Carriers.

As discussed above, the Fleet Call petition and the Commission's pending proposal to eliminate SMR end user licensing would remove the last vestiges of functional

⁹ "Digital Technology To Help SMR Compete With Cellular," Industrial Communications, March 20, 1992, at 3.

¹⁰ Id.

distinctions between cellular carriers and ESMRs. Yet, enormous regulatory disparities would persist at the state and federal levels. In each case, the regulatory burdens fall with greater weight upon cellular carriers.

The principal regulatory differences between cellular and ESMR carriers may be summarized as follows:

Cellular Obligations

Cellular carriers are subject to costly and intrusive rate and entry regulation by the states.

Cellular carriers must permit unrestricted resale of their services.

Cellular carriers must provide service to any customer upon reasonable request.

Cellular carriers may not engage in unreasonable discrimination.

Cellular carriers must allow their competitors to interconnect with their own networks.

Cellular carriers are prohibited from providing dispatch services on common carrier frequencies.

ESMR Freedoms

ESMRs are not subject to state regulation.

ESMRs need not permit resale.

ESMRs may pick and choose only the most profitable customers.

ESMRs may price-discriminate at will.

ESMRs need not permit interconnection.

ESMRs may provide any two-way communications service.

Obviously, the scope, breadth and weight of the obligations imposed upon cellular carriers can impede full, fair and effective competition with ESMRs now and in the future.

These regulatory impediments are particularly detrimental because Fleet Call and its consortium are seeking to assemble and control a nationwide wireless infrastructure. As noted above, this infrastructure will be directly competitive with wide-area cellular services. However, whereas the cellular infrastructures (wireline and non-wireline) are an amalgamation of numerous individual networks, there would be only one, closely held ESMR infrastructure.¹¹

In light of these concerns, the Commission should seize this occasion to undertake a basic reassessment of its licensing and regulatory goals for mobile services. An important first step should be removing the current bar on cellular carriers' expanding their basic service offerings to include ancillary offerings of SMR and dispatch services, as

¹¹ Fleet Call already controls from over fifty percent to almost one hundred percent of the SMR channels in six of the ten largest markets. See Fleet Call Waiver Request, p. 42. Fleet Call also has joined with American Mobile Systems, Dispatch Communications, CenCall, and Transit Communications to form the Digital Mobile Network Roaming Consortium ("DMNRC"). The DMNRC, which covers areas that include ninety million potential subscribers, will be well-positioned to dominate the planned SMR wireless network infrastructure. See "SMR Consortium Adds Fleet Call -- Forms Marketing/Service Plan," Industrial Communications, Feb. 21, 1992, at p. 5.

requested by the Telocator Flexible Cellular petition. That Petition would allow cellular carriers to offer private radio services on a secondary basis, subject to appropriate private carrier regulations.

In addition, the Commission should commence a comprehensive proceeding to rationalize its mobile radio regulations. The options are many and dramatically different. They could range from imposing strict functional differences between common and private carriers to eliminating all regulatory distinctions whatsoever. However, the current pattern of accelerated relief for private carriers and inaction on relief for common carriers clearly should not be allowed to persist.

IV. CONCLUSION

Fleet Call's petition seeks to auction "innovator blocks" of SMR frequencies in order to duplicate cellular roaming capabilities and create a national wireless infrastructure that would provide cellular-type ubiquitous coverage. The relief sought, combined with adoption of the Commission's proposal to eliminate separate licensing of SMR end users, would remove any vestigial distinctions between SMRs and cellular carriers.

Because a necessary precondition to Fleet Call's request is auction authority, which the Commission does not have, the

Commission should defer consideration of the proposal until enabling legislation is enacted. In the interim, however, the petition highlights the need for the Commission to address important issues associated with the transformation of SMRs into cellular equivalents. First, the Commission should carefully consider the effects of Fleet Call's proposal and the end user licensing proceeding on ESMRs' legal status as private carriers. Second, the Commission should remove regulatory barriers to full cellular competition with ESMRs in the SMR and dispatch marketplace. Third, the Commission should commence a proceeding to develop long-term policies governing the relationships between common carrier and private carrier providers of mobile services.

Respectfully submitted,

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July 17, 1992

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July, 1992, I caused copies of the foregoing "Comments" to be mailed via first-class postage prepaid mail to the following:

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